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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

DEPARTMENT OF TREASURY OF THE STATE OF INDIANA, M. CLIFFORD TOWNSEND, JOSEPH M. ROBERTSON and FRANK G. THOMPSON, as and constituting the Board of Department of Treasury of the State of Indiana, *Petitioners,*

v.

INGRAM-RICHARDSON MANUFACTURING COMPANY OF INDIANA, INC., *Respondent.*

No. 655

PETITION FOR REHEARING

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INDIANAPOLIS

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PETITION FOR REHEARING

Comes now the above-named respondent, Ingram-Richardson Manufacturing Company of Indiana, Inc., and presents this, its petition for a rehearing of the above entitled cause, and, in support thereof, respectfully shows under Part One the error and the implications of the Court's decision on the merits, and under Part Two the error and the far-reaching implications of the Court's dicta as to the duty of the respondent properly to present the question of apportionment or exclusion to the state administrative officials:

Part One

1. It is obvious in the case at bar that the $5 410 20.00 of gross receipts which were taxed, or used as the measure of the tax, were derived from a *combination* of local activities *and* interstate and out-of-state activities. The local activities consisted of the manufacture of the hard, finished enamel at the respondent's plant in Indiana. The interstate and out-of-state activities consisted, in the main, of sales activities and of transporting the parts to be enameled from points in Illinois, Michigan, Ohio and Wisconsin to the respondent's plant in Indiana, and of transporting the enameled parts from Indiana back to points in Illinois, Michigan, Ohio and Wisconsin. A part of the $5 410 20. represented reimbursement to respondent of the cost of the local activities; a part (and a substantial part) of the $5 410 20. represented reimbursement to respondent of the cost of the interstate and out-of-state activities; and the balance of the $5 410 20. represented profit derived from the *combination* of the various activities. Although the cost of the various activities might be ascertainable with some degree of certainty, it is clear that the amount of profit allocable to the local activities, as distinguished from the amount of profit allocable to the interstate and out-of-state activities, is inherently and practically incapable of determination. Consequently, it is inherently and practically impossible to determine what portion of the total gross receipts of $5 410 20. is allocable to local activities, and what portion thereof is allocable to interstate or out-of-state activities. Neither the Indiana Gross Income Tax Act nor the regulations prescribe any formula for apportionment in cases of this nature. Court decisions do not give the answer.

2. Prior to the decision in the instant case, this Court has always held that a state cannot tax local activities and include in the measure of the tax gross receipts derived from interstate or out-of-state activities. Such a tax has been considered to be a direct tax upon such interstate or out-of-state activities and therefore void under the commerce clause and due process clause in the Federal Constitution. See *James v. Dravo Contracting Company* (1937), 302 U. S. 134, 82 L. Ed. 155; *J. D. Adams Mfg. Co. v. Storen* (1937), 304 U. S. 307, 82 L. Ed. 1365; *Gwin, White & Prince v. Henneford* (1938), 305 U. S. 434, 83 L. Ed. 272; and cases cited.

3. Without purporting to overrule any of its prior decisions, the Court now indicates that a state may tax local activities and include in the measure of the tax gross receipts derived from interstate or out-of-state activities if such activities are but "incident" to the local business. This distinction, of course, raises the very difficult problem of determining in each case which activities are merely "incident" to the local activities, and which activities are not merely incident but are "necessary" to the local activities. Even if the distinction be proper in some cases, it is not valid in the case at bar. It must not be overlooked that the *entire* sum of $5,410.20 was derived *solely from services performed for out-of-state customers.* (R. 20.) Only out-of-state business is involved here. The respondent's business with Indiana customers is not involved.

4. As a necessary and integral part of the out-of-state business from which the respondent received the $5,410.20, the respondent had to transport the parts to be enameled from points outside Indiana to its plant in Indiana, and had to transport the enameled parts from its plant in In-

diana to points outside Indiana. Without these interstate and out-of-state activities there would not have been any out-of-state business and the $5,410.20 would not have been received, or, at least, if the respondent's out-of-state customers had been required to furnish their own transportation, the amount respondent would have received from the out-of-state business would have been substantially less than $5,410.20. It is therefore obvious that the interstate and out-of-state activities were just as necessary an element in the process of realizing the $5,410.20 as were the local activities. These interstate and out-of-state activities can not in any sense be considered to be but "incident" to a local business in so far as the $5,410.20 is concerned. They were "necessary" and "essential," and without them the $5,410.20, or a substantial part thereof, would not have been realized.

5. Cases can be imagined where the costs of the interstate and out-of-state activities equalled such a small percentage of the costs of the local activities that a court would be justified in holding that the interstate and out-of-state activities were too insignificant to require an apportionment. But assume the costs of the interstate and out-of-state activities equalled a substantial percentage—say 10%, 30%, 50%, 75%, 100% or 500%—of the costs of the local activities. Certainly, in any such case the interstate or out-of-state activities could not be regarded as insignificant, or but "incident" to the local activities. In the case at bar, the costs to respondent of the necessary interstate and out-of-state activities were substantial and equalled a substantial percentage of the costs of the local activities. A substantial portion of the $5,410.20 represented reimbursement to respondent for these interstate and out-of-

state activities, and a still larger portion of the $5,410.20 represented reimbursement to respondent for these activities plus the portion of the profit attributable to them.

6. If Indiana can tax these necessary interstate and out-of-state activities, then all other states in which the respondent must perform any part of these necessary activities can impose a like tax. Thus, the respondent would be subjected to the risk of a multiple tax burden to which its competitors whose activities do not cross the state line would not be subjected. In other words, the respondent, *solely because of these necessary interstate and out-of-state activities,* would be subjected to additional tax burdens to which a local business would not be subjected. This constitutes a discrimination against interstate and out-of-state activities prohibited by the Federal Constitution. It was just this type of discriminatory taxation that this Court condemned in the *J. D. Adams Mfg. Co. case* and in the *Gwin, White & Prince case.*

7. It has always heretofore been held that in cases of this nature where the receipts are derived from a *combination* of local activities *and* interstate or out-of-state activities which are inherently and practically incapable of separation, the matter of apportioning the income is purely a legislative function. If the legislature does not see fit to exercise this function and prescribe a formula for apportionment, the administrative officials and the courts are without power to do so, and no part of the income can be taxed. *Meyer v. Wells, Fargo & Co.* (1912), 223 U. S. 297, 56 L. Ed. 445; *J. D. Adams Mfg. Co. v. Storen* (1937), 304 U. S. 307, 82 L. Ed. 1365; *Gwin, White & Prince v. Henneford* (1938), 305 U. S. 434, 83 L. Ed. 272; *Porto Rico Mercantile Co. v. Gallardo* (1925, C. C. A. 1st), 6 F. (2d) 526;

Dravo Contracting Co. v. James (1940, C. C. A. 4th), 114 F. (2d) 242; *Commonwealth v. P. Lorillard Co., Inc.* (1921), 129 Va. 74. It is only where the gross receipts derived from interstate or out-of-state activities are clearly and easily separable from gross receipts derived from the local activities that an exclusion or apportionment can be made without a legislative formula. *Dravo Contracting Co. v. James, supra.* This principle has not been considered to be a serious limitation upon the taxing power of the states because it can be obviated by the state legislatures whenever they, in their judgment and discretion, see fit to exercise their legislative right to prescribe a reasonable formula for apportionment.

8. It must be assumed that the Indiana Legislature knew of this limitation upon its taxing power when it passed the Gross Income Tax Act in 1933 and when it revised the Act in 1937. The Indiana Legislature, for reasons presumably satisfactory to it, has not yet seen fit to exercise this particular legislative function and prescribe a formula for apportionment in cases of this kind. It has always been free to do so in the past and it will be free to do so at any time in the future when it so desires. Certainly, until such time as the Indiana Legislature sees fit to exercise its right to prescribe a formula whereby, in cases of this nature, that portion of the gross receipts derived from local activities can be separated from that portion which is derived from interstate or out-of-state activities, this Court should follow the former decisions and hold that no part of such gross receipts can be taxed. Such a ruling will not impose any serious limitation upon the taxing power of Indiana. It would simply constitute an affirmance of the principle heretofore established, that if Indiana desires to tax that por-

tion of the income which can reasonably be said to be attributable to Indiana activities, her legislature must first prescribe a reasonable formula. In the absence of such a formula, neither the taxpayers, the administrative officials, nor the courts will know how, or have the right or power, to act in the matter of apportionment.

9. For the foregoing reasons it is respectfully urged that this petition for a rehearing should be granted, and that the judgment of the Circuit Court of Appeals for the Seventh Circuit be, upon further consideration, affirmed; or at least when the cause is remanded to the District Court that such Court be instructed to permit respondent to introduce evidence on the issue of whether respondent's interstate and out-of-state activities were substantial.

Part Two

10. In addition to the decision on the merits, the Court made the following observations with respect to the duty of the respondent to present the question of apportionment or exclusion to the state administrative officials:

> "Moreover, if the transportation of the metal parts were regarded as an item of service for which a deduction should have been allowed, we think that it was the duty of respondent, in view of the fact that it was conducting an intrastate business clearly subject to the tax, to claim the deduction and show the amount which should be allowed. It does not appear that respondent did either. Respondent made its claim for a total exemption from the tax upon the ground that it was laid upon interstate sales, a contention which it has failed to support.

> "The State contends, citing provisions of the taxing act, that the legislature of Indiana contemplated that the taxpayer would reflect in the tax return any deductions claimed, making a separation between taxable and non-taxable items and that the tax return itself provided a method for claiming any deductions to which the taxpayer thought itself entitled. Respondent insists that the Act did not provide a method of apportionment. In the absence of an effort on the part of the respondent to present a claim for deduction and to have the state authorities pass upon the question of deduction or apportionment, as distinguished from its claim for a total exemption, we are not called upon to attempt to resolve the question of state law."

11. Irrespective of what this Court does concerning a rehearing on the merits of this case, the above-quoted observations should be eliminated from its opinion, for the following reasons:

(a) This procedural point was not raised at any time by the petitioners. It was not raised in the trial Court by their answer or otherwise. It was not raised in the Circuit Court of Appeals by the petitioners' statement of points required by Rule 75(d) of the Rules of Civil Procedure for District Courts of the United States (R. 29, 30); or by their briefs in the Circuit Court of Appeals; or by their petition for rehearing in the Circuit Court of Appeals; or in any other manner. It was not raised in this Court by the petitioners' petition for certiorari; or by their specifications of errors or their briefs; or in any other manner. This should be conclusive evidence that the petitioners, themselves, did not deem it necessary or proper for the respondent to present the question of apportionment or

exclusion to the state administrative officials by its tax return or claim for refund.

(b) This procedural point was raised for the first time by the Court, itself, at the close of the oral argument. Pursuant to the request of the Chief Justice, copies of the Act and regulations were filed with the Court. But the application and meaning of the various provisions of the Act and regulations have not yet been fully or adequately argued. Nevertheless, the Court has indicated that it was respondent's duty to take, with the state authorities, steps which the Court has specifically refused to decide whether the Act and regulations provide for.

(c) While it might be reasonable to require a taxpayer who derives gross income from separable interstate or out-of-state transactions, to separate such gross income from income derived from local activities and claim a right to a deduction in his tax return or claim for refund, it is wholly unreasonable to require a taxpayer who derives gross income from a *combination* of local activities *and* interstate or out-of-state activities which are inherently and practically incapable of separation to attempt any exclusion or apportionment. In the absence of a formula prescribed in the taxing law, what formula is the taxpayer going to assert? Is he to apportion his gross receipts according to the relative costs of the various activities; or according to the time devoted to the various activities; or according to the amount invested in the various states where the activities are performed? The taxpayer, administrative officials and the courts are left wholly without a guide of any kind. And what would happen if the taxpayer should assert a method of apportionment which this Court later holds was not the right method? Must the taxpayer

act at his peril? If he asserts the wrong method of apportionment is he to be thereafter foreclosed from resorting to the courts to enforce his claim for refund even though it is just and meritorious? There are no provisions in the Indiana Gross Income Tax Act and no regulations which will even remotely aid the taxpayer with the many problems presented by the Court's decision on the procedural point.

(d) As above pointed out in paragraph 7 of this petition for rehearing, it has heretofore always been held that where the receipts are derived from a *combination* of local activities *and* interstate or out-of-state activities, the matter of apportioning the income is purely a legislative function, and, in the absence of a formula prescribed by the legislature, neither the administrative officials nor the courts have the legal right or power to pass upon the question of apportionment. Under these decisions, taxpayers and their lawyers have justly believed that it was not necessary to present to the Indiana administrative officials the matter of apportionment—a matter with respect to which, under the prior decisions, the administrative officials had no legal right or power to act. As late as May 16, 1937, this Court, in the *J. D. Adams Mfg. Co. case*, which involved the Indiana Act, gave no intimation that it was the duty of the taxpayer to present the question of apportionment or exclusion to the Indiana administrative officials. Indeed, the opinion of this Court in that case indicates quite clearly that no such duty rested upon the taxpayer. If the above-quoted portions of the Court's opinion in the instant case are allowed to remain therein, many taxpayers who have just and valid claims for the refund of taxes that were illegally and unconstitutionally

exacted under the Federal Constitution may, and probably will, be denied relief solely because they and their attorneys relied upon the prior court decisions and did not deem it necessary or proper to present the matter of apportionment or exclusion to the state administrative officials.

(e) A decision by the Court on the procedural point is not necessary to a decision on the merits of the case.

11. For the foregoing reasons it is respectfully urged that, irrespective of what this Court does concerning a rehearing on the merits of this case, the above-quoted portions of the Court's opinion should be eliminated therefrom.

Respectfully submitted,

EARL B. BARNES,
ALAN W. BOYD,
CHARLES M. WELLS,
1313 Merchants Bank Bldg.,
Indianapolis, Indiana,
Counsel for Respondent.

CERTIFICATE OF COUNSEL

I, Earl B. Barnes, counsel for the above-named respondent, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

EARL B. BARNES,
Counsel for Respondent.

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SUPREME COURT OF THE UNITED STATES.

No. 655.—October Term, 1940.

Department of Treasury of the State of Indiana, et al., etc., Petitioners, *vs.* Ingram-Richardson Manufacturing Company of Indiana, Inc.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Seventh Circuit.

[May 5, 1941.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

The Circuit Court of Appeals, affirming the District Court, has held that respondent, Ingram-Richardson Manufacturing Company, is entitled to a refund of a tax levied under the Indiana Gross Income Tax Law,[1] upon the ground of the invalidity of the tax under the commerce clause of the Federal Constitution. 114 F. (2d) 889. We granted certiorari because of an alleged conflict with applicable decisions of this Court. February 3, 1941.

The tax was for $5410.20[2] and was laid upon respondent's gross receipts derived as follows:

Respondent, an Indiana corporation, has a factory at Frankfort in that State where it manufactures enamel, both in a granular form, known as frit, and in a hard, finished form fused with metal articles. In the instant case the enamel was fused with metal parts used in stoves and refrigerators manufactured by respondent's customers in various States other than Indiana. Respondent's traveling salesmen solicited orders from such customers pursuant to which respondent transported by its trucks the stove and refrigerator parts belonging to its customers from their plants to its own plant for enameling. There the enameling was done by the process set forth in the findings, and respondent then hauled the enameled parts back to its customers' factories. Respondent there-

[1] Section 2 of Chapter 50 of the Acts of Indiana of 1933. 11 Burns Indiana Statutes, Sec. 64-2602. See Department of Treasury v. Wood Preserving Corporation, No. 654, decided April 28, 1941.

[2] The suit also embraced a claim for an additional sum of $1154.26 recovery of which was denied below. That claim is not before us.

after billed its customers for the enameling and remittances were made to respondent by mail. The value of the metal parts as units after the completion of the enameling process was from two and one-half to three times the value of the respective parts before the enameling.

Respondent's contention, as set forth in its complaint and as still asserted, is that these transactions constituted sales of the hard, finished enamel in interstate commerce. The Circuit Court of Appeals disagreed with that contention and held that the income in question was derived from services. We are in accord with that view.

In the alternative, respondent contends that the services paid for included the solicitation of orders by respondent's agents and the execution of contracts in other States, interstate communications by mail, telephone and telegraph, and also the transportation by respondent of the stove and refrigerator parts from and to places in other States.

The enameling process was an activity performed at respondent's plant in Indiana and the gross receipts therefrom were taxable by Indiana under its Gross Income Tax Law. See *Department of Treasury of Indiana* v. *Wood Preserving Corporation*, No. 654, decided April 28, 1941. The fact that the orders for the enameling were obtained by respondent's agents and contracts were executed outside Indiana did not make the enameling process other than an intrastate activity and any the less a proper subject for the application of the taxing statute. *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, 253.

But the court below has held that there was included in the service rendered by respondent the transportation by its trucks of the stove and refrigerator parts from and to the customers' plants in other States. The court thought that the reasoning of our opinion in *Gwin, White & Prince* v. *Henneford*, 305 U. S. 434, applied. That case, however, presented a different situation. The business there was that of a marketing agent for a federation of fruit growers and the state tax was measured by the gross receipts of the taxpayer from the business of marketing fruit shipped from the taxing State to the places of sale in other States and foreign countries. We found that the entire service for which the compensation was paid was "in aid of the shipment and sale of mer-

chandise in that commerce" (interstate and foreign) and hence the service was held to be within the protection of the commerce clause. *Id.*, p. 437. Here, on the contrary, the entire service was in aid of the enameling business conducted within the State. The transportation of the metal parts to and from Indiana were but incident to that intrastate business, as was the circulation of appellants' magazine in States other than the taxing State in the *Western Live Stock* case, *supra*, p. 254.

Moreover, if the transportation of the metal parts were regarded as an item of service for which a deduction should have been allowed, we think that it was the duty of respondent, in view of the fact that it was conducting an intrastate business clearly subject to the tax, to claim the deduction and show the amount which should be allowed. It does not appear that respondent did either. Respondent made its claim for a total exemption from the tax upon the ground that it was laid upon interstate sales, a contention which it has failed to support.

The State contends, citing provisions of the taxing act, that the legislature of Indiana contemplated that the taxpayer would reflect in the tax return any deductions claimed, making a separation between taxable and non-taxable items and that the tax return itself provided a method for claiming any deductions to which the taxpayer thought itself entitled. Respondent insists that the Act did not provide a method of apportionment. In the absence of an effort on the part of respondent to present a claim for deduction, and to have the state authorities pass upon the question of deduction or apportionment, as distinguished from its claim for a total exemption, we are not called upon to attempt to resolve the question of state law.

The judgment of the Circuit Court of Appeals is reversed and the cause is remanded to the District Court for further proceedings in conformity with this opinion.

It is so ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.